

学校编码：10384
学号：X2006120101

分类号____密级____
UDC_____

我国民事抗诉制度司法运行现状及改革探索

涂永顺

指导教师
张榕教授

厦门大学

厦 门 大 学
硕 士 学 位 论 文

我国民事抗诉制度司法运行现状及改革探索

—以三明市两级检察院之民行抗诉为研究视角

On Current Situation and Improvement of The Civil Protest Institution

—Take the Two Level Procuratorates in SanMing as Research Object

涂永顺

指导教师姓名：张榕教授

专业名称：法律硕士

论文提交日期：2010年04月

论文答辩时间：2010年05月

学位授予日期：2010年 月

答辩委员会主席：_____

评 阅 人: _____

2010 年 04 月

厦门大学博硕士论文摘要库

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为()课题(组)的研究成果,获得()课题(组)经费或实验室的资助,在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名): 涂永顺

2010 年 4 月 9 日

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

（ ） 1. 经厦门大学保密委员会审查核定的保密学位论文，
于 年 月 日解密，解密后适用上述授权。

（ ） 2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人：涂永顺

2010 年 4 月 9 日

摘 要

2007 年 10 月《民事诉讼法》的修改细化了再审事由，完善了审判监督程序，局部修改了民事检察制度。这次修改推动了民事检察监督制度的发展，但仍未从根本上解决民事抗诉制度存在的弊端。本文以三明市两级检察院之民事抗诉为研究视角，从 2007 年《民事诉讼法》审判监督程序修改的内容对民事检察工作所带来的影响入手，研究民事抗诉制度的司法运行现状，分析现行民事抗诉制度的不足，并对我国民事抗诉制度的发展提出基本的法律构想。

本文除前言和结语外，共分为四章。

第一章我国民事抗诉制度的概述。本章除介绍我国民事抗诉制度的内涵、法律特征外，还论述了民事抗诉制度的价值，并对当前部分学者对我国民事抗诉制度提出的质疑进行讨论。

第二章 2007 年《民事诉讼法》对我国民事抗诉制度的改进。本章详细分析了 2007 年《民事诉讼法》对民事抗诉规定的变化，并分析此次修改对民事抗诉实践可能产生的正面效应。

第三章修改后的民事抗诉制度司法运行现状及存在的问题。本章通过对《民事诉讼法》修改前后的 2007 年、2008 年两年三明市两级检察院的民事抗诉工作的考察，分析 2007 年《民事诉讼法》实施后，民事抗诉工作呈现的新特点，并探寻修改后的民事抗诉制度仍存在的不足。

第四章对我国民事抗诉制度改革及工作机制改进的思考。本章结合我国国情，对完善我国民事抗诉制度提出了几点构想：一是赋予基层检察机关民事抗诉权；二是建立多元化的检察监督方式；三是扩大民事抗诉对象的范围；四是界定检察机关在再审程序庭审中的法律地位。同时，对民事抗诉工作机制的改进也结合司法实践提出了几点设想。

关键词：民事抗诉；民诉法修改；改革探索

ABSTRACT

The modification of Civil Procedure Law of the People's Republic of China in Oct, 2007, has improved the system of supervision from people's procuratorate. Therefore, it does help perfect the procedure of adjudication supervision. However, this modification hasn't eliminated its shortages completely. The paper expounds impacts on judicial practice of both basic and the intermediate People's Procuratorate in Sanming District brought by the amendment of the Civil Procedure Law since 2007. Then a general introduction to how to improve the procedure of adjudication system would be provided while analyzing the deficiency of it at the same time.

Apart from the introduction and the conclusion, the paper could be divided into four parts.

Chapter 1 provides a general introduction to the Civil Protest Institution. The meaning and the law characteristic of civil protest institution would come up in this chapter. Besides, the value of civil protest institution would be further elaborated later. Meanwhile, discussions are also made to arguments from different scholars on the civil protest institution.

Chapter 2 discusses the modification of the civil protest institution in the 2007 Civil Procedure Law. This chapter mainly focuses on changes that take place in civil protest institution of the 2007 Civil Procedure Law. Besides, possible positive impacts on the judicial practice of civil protest would be analyzed in this chapter.

Chapter 3 is held to interpret the current situation and problems of Civil Protest Institution. While comparing the work of filing the protest in both the basic and intermediate procuratorates of Sanming District, this chapter is held to reveal new features of civil protest institution after the implementation of Civil Procedure Law in 2007. Moreover, this chapter also explores the deficiency of the civil protest institution after its modification.

Chapter 4 emphasizes the improvement of Civil Protest Institution. In light of the national situation in China, this chapter puts forward some ideas about the Improvement of Civil Protest Institution. First, the basic people's procuratorate should have the right to file the protest; Second, a wide range of ways to supervise by the people's procuratorate should be established; Third, the scope of civil protest should be expanded; Fourth, the legal status of the people's procuratorate should be clarified in the retrial procedure. Finally, suggestions about the improvement of the civil protest institution are also set forth in this chapter.

Key Words: Civil Protest Institution; the Modification of Civil Procedure Law; Exploration and Improvement

厦门大学博硕

目 录

前 言.....	1
第一章 我国民事抗诉制度概述	2
第一节 民事抗诉制度的内涵及法律特征.....	2
一、我国民事抗诉制度的内涵.....	2
二、我国民事抗诉制度的法律特征.....	3
第二节 我国民事抗诉制度的价值.....	5
一、司法公正价值.....	5
二、秩序价值.....	6
三、权利价值.....	7
第三节 对我国民事抗诉制度的四种质疑.....	8
一、民事抗诉制度是否干预了审判独立、损害了审判权威.....	8
二、民事抗诉制度是否破坏了“不告不理”的诉讼原则	9
三、民事抗诉制度是否打破了当事人地位平等的诉讼格局.....	10
四、民事抗诉制度是否破坏了民事裁判的终局性.....	10
第二章 2007 年《民事诉讼法》对民事抗诉制度的改进.....	12
第一节 2007 年《民事诉讼法》对民事抗诉制度规定的改进.....	12
一、细化了再审事由.....	12
二、完善了再审程序.....	13
三、局部修改了民事检察制度.....	14
第二节 2007 年《民事诉讼法》对民事抗诉实践可能产生的正面效应	15
一、提供更多受案机会.....	15
二、增加抗诉力度.....	15
三、提高办案效率.....	16
四、拓展监督空间.....	16
第三章 修改后的民事抗诉制度司法运行现状及存在的问题.....	18

第一节 修改后的民事抗诉制度的司法运行现状	18
一、民事抗诉案件办理情况	18
二、民事抗诉制度修改后司法实践工作呈现的新特点	18
第二节 修改后的民事抗诉制度仍存在的缺陷	21
一、检察院抗诉主体在庭审中的法律地位不明	21
二、民事抗诉权的行使缺乏保障	22
三、民事抗诉环节多，时间长	22
四、各级检级不分，职责不清	23
五、民事抗诉范围规定模糊	23
六、对向检察机关提出申诉的期限仍未予以明确	24
第四章 对我国民事抗诉制度改革及工作机制改进的思考	25
第一节 民事抗诉制度改革应坚持的原则	25
一、统筹兼顾，公正和效率并重原则	25
二、诉讼经济原则	26
三、级别对等原则	26
第二节 民事抗诉制度改革的几点构想	26
一、赋予基层检察机关民事抗诉权	26
二、建立多元化的检察监督方式	27
三、扩大民事抗诉对象范围	29
四、界定检察机关在庭审中的法律地位	31
第三节 对民事抗诉工作机制改进的构想	32
一、建立律师代理民行申诉案件机制	32
二、建立上下级检察机关联合办案机制	32
三、建立“快速审查”机制	33
四、建立与人大、法院等部门之间的良性互动机制	33
结 语	35
参考文献	36

CONTENTS

Introduction	1
Chapter 1 The Introduction to Civil Protest Institution in China	2
Subchapter 1 The Meaning and the Law Characteristic of Civil Protest Institution	2
Section1 The Meaning of Civil Protest Institution	2
Section2 The Law Characteristic of Civil Protest Institution	3
Subchapter 2 The Value of Civil Protest Institution	5
Section 1 The Value of Justice	5
Section 2 The Value of Oder	6
Section 3 The Value of Power	7
Subchapter 3 Four Typical Arguments for Civil Protest Institution	8
Section 1 Whether Civil Protest Institution Intervening the Judicial Independence	8
Section 2 Whether Civil Protest Institution Contradicting the "No Trial Without Complaint" Principle	9
Section 3 Whether Civil Protest Effecting the Equal Status of Both Parties During the Action	10
Section 4 Whether Civil Protest Going Against the Finality of Civil Jurisdiction	10
Chapter 2 The Improvement of Civil Procedure Law in 2007 Version	12
Subchapter 1 The Modification of Civil Procedure Law in 2007 Version	12
Section1 A Detailed List of the Retrial Situations	12
Section2 An Improvement of the Retrial Procedure	13
Section3 A Modification of the Civil Prosecution System in Part	14
Subchapter 2 Possible Positive Impacts on Judicial Practice Brought by 2007 Version	15
Section 1 Providing More Opportunities for Hearing Cases	15
Section 2 Enhancing the Intensity of Civil Protest	15

Section 3	Raising the Work Efficiency·····	16
Section 4	Expanding the Scope of Supervision·····	16
Chapter 3	The Current Situation and Relevant Problems of Civil Protest Institution ·····	18
Subchapter 1	The Current Situation of Civil Protest Institution Since 2007 ···	18
Section 1	The Current Situation of Handling Civil Cases in Judicial Practice ·	18
Section 2	New Characteristics in Judicial Practice Since 2007·····	18
Subchapter 2	Shortages of the Revised Civil Protest Institution ·····	21
Section 1	An Unclear Legal Status of the People's Procuratorate in Civil Retrial ·····	21
Section 2	The Lack of Protection to the Exercise of Civil Protest Rights ·····	22
Section 3	The Time-consuming Filing the Protest in Civil Procedure ·····	22
Section 4	An Unclear Distinction of Civil Protest Between Different Levels of People's Procuratorate ·····	23
Section 5	A Blurred Scope of Civil Protest Situations ·····	23
Section 6	An Obscure Time Limit of the Appeal Held by the People's Procuratorate ·····	24
Chapter 4	Ideas About the Improvement of Civil Protest Institution ·····	25
Subchapter 1	Principles Kept in the Civil Protest Institution Improvement ···	25
Section 1	Combining principles of justice and efficiency ·····	25
Section 2	Adhering to the Principle of Implementing a Low-cost Litigation ···	26
Section 3	Abiding by the Principle of Each Power Matching Its Relevant Judicial Department ·····	26
Subchapter 2	Ideas About the Improvement of Civil Protest Institution ·····	26
Section 1	Endowing the Right to File the Protest to the Basic People's Procuratorate ·····	26
Section 2	Developing a Wide Range of Inspection and Supervision Ways ·····	27
Section 3	Expanding the Scope of Civil Protest Issues ·····	29
Section 4	Defining the Legal Status of the People's Procuratorate During the Retrial ·····	31

Subchapter 3	Ideas About the Improvement of the Working Mechanism in Civil Protest Institution	32
Section 1	Establishing the System of Lawyers Filing the Protest on Behalf of Parties	32
Section 2	Combining Joint Efforts from Upper and Its Lower Procuratorates in Handling Civil Protest Cases	32
Section 3	Developing the "Quick Review" Mechanism	33
Section 4	Establishing a Positive Interaction Between NPC and Judicial Departments	33
Conclusion	35
Bibliography	36

前 言

我在检察机关工作已届 6 年，由于对民事抗诉工作的耳濡目染，体会颇多。曾经，我也人云亦云的怀疑过民事抗诉制度存在的必要性。特别是在工作中看到民事抗诉制度在运行时存在着一些问题，诸如案源偏少、再审改判率低、法院对检察建议熟视无睹等使我对民事抗诉制度心生疑虑。但是，随着对理论学习和思考的深入，我渐渐的发现，那些主张废除民事抗诉制度的观点也很值得商榷。随着工作时间的推移，我接触到越来越多的民事抗诉案件，特别是看到申诉人的合法权益因错误民事裁判而遭到损害，在向法院申诉时却往往很难启动再审程序，这些都使我认识到民事抗诉制度存在的意义。

2007 年 10 月，《民事诉讼法》修正案获得通过，其对民事抗诉制度的修改，是对民事抗诉制度的肯定，亦为推动民事检察监督工作的发展。然而修改后的民事抗诉制度在司法实践中运行两年来，未实现预期的目标，民事抗诉制度仍存在诸多不足之处。经过近半年的努力，我试着以三明市两级检察院的办案实践为视角，研究修改后的民事抗诉制度的司法运行现状，探寻修改后的民事抗诉制度仍存在的不足，并提出了自己对完善民事抗诉制度的一些粗浅思考，以期对我国民事抗诉制度的研究贡献绵薄之力。

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕